View metadata, citation and similar papers at core.ac.uk

brought to you by CORE

provided by University of Kentucky

University of Kentucky
UKnowledge

1970-1979 Briefs

6-7-1976

Elizabeth Popp, Individually and as Co-Executor of the Mary Morgan Estate v. Roy S. Morgan, Jr., Co-Executor

Appellant's Brief 1976-SC-0383

Right click to open a feedback form in a new tab to let us know how this document benefits you.

Follow this and additional works at: https://uknowledge.uky.edu/ky_appeals_briefs70s

Part of the Courts Commons

Repository Citation

1976-SC-0383, Appellant's Brief, "Elizabeth Popp, Individually and as Co-Executor of the Mary Morgan Estate v. Roy S. Morgan, Jr., Co-Executor" (1976). *1970-1979*. 863.
https://uknowledge.uky.edu/ky_appeals_briefs70s/863

This Brief is brought to you for free and open access by the Briefs at UKnowledge. It has been accepted for inclusion in 1970-1979 by an authorized administrator of UKnowledge. For more information, please contact UKnowledge@lsv.uky.edu.

KYSC1976-SC-0383-01
{8F8698F8-FD4E-4CC6-8C44-D0D6FF59638A}
{135147}{54-130809:123406}{060776}

APPELLANT'S BRIEF

4595

SUPREME COURT OF KENTUCKY

FILE NO. 76-383

ELIZABETH POPP, Individually and as Co-Executor of the Mary Morgan Estate ..... Appellant

Versus

ROY S. MORGAN, JR., Co-Executor ..... Appellee

APPEAL FROM THE SCOTT CIRCUIT COURT
Hon. Robert Hall Smith, Judge

BRIEF FOR APPELLANT

FILED

JUN 7 1976

Mc yne Collins
CLERK
Supreme Court Of Kentucky

JAMES L. GAY
197 South Main Street
Versailles, Kentucky 40383

Attorney for Appellant

Copies of this Brief for Appellant have been served on the Appellee and Circuit Court Judge as required by RCA 1.250 this 7 day of June, 1976.

James L. Gay
Attorney for Appellant

PROFESSIONAL PRINTING CO., INC., 1113 Commercial Dr., Lexington, Ky. 40505 - 252-8402

TABLE OF CONTENTS AND AUTHORITIES

TABLE OF CONTENTS, POINTS AND AUTHORITIES

STATEMENT OF QUESTIONS PRESENTED

I. WHETHER THE CIRCUIT COURT ERRED IN GRANTING A SUMMARY JUDGMENT IN THE CASE AT BAR.

II. IF THIS CASE WAS A PROPER ONE FOR GRANTING SUMMARY JUDGMENT SHOULD SUMMARY JUDGMENT HAVE BEEN ENTERED FOR APPELLANT AS A MATTER OF LAW.

SUPREME COURT OF KENTUCKY

FILE NO. 76-383

ELIZABETH POPP, Individually and as Co-Executor of the Mary Morgan Estate ..... Appellant

Versus

ROY S. MORGAN, JR., Co-Executor ..... Appellee

APPEAL FROM THE SCOTT CIRCUIT COURT
Hon. Robert Hall Smith, Judge

BRIEF FOR APPELLANT

MAY IT PLEASE THE COURT:

STATEMENT OF CASE

Mrs. Mary Morgan died testate in Scott County, Kentucky, her will having been probated on the third day of December, 1973, in Scott County.

Mrs. Mary Morgan was survived by two children, Elizabeth Popp and Roy S. Morgan, Jr. Under the terms of the will, Elizabeth Popp and Roy S. Morgan, Jr. were named as joint executors for the purpose of administering the estate of Mrs. Mary Morgan.

A dispute arose between the co-executors as to the interpretation of the will with respect to the fifth dispositive paragraph (pages 3-4 of record) which provides:

I will and devise my farm of 25 acres on the

> west side of the Soards Pike in Scott County, Kentucky, and all improvements thereon to my son, Roy S. Morgan, Jr., but I hereby place thereon a valuation of Sixteen Thousand Dollars ($16,000.00), and I direct that my said son shall pay to my daughter, Elizabeth Popp, the sum of Eight Thousand Dollars ($8,000.00) representing her one-half (½) interest in same, and so as to equalize her in the settlement of my estate. Upon such payment, the title to said tract of land shall vest absolutely and in fee simple in my said son, Roy S. Morgan, Jr., without requirement of any further deed of conveyance. Evidence of such payment shall be shown by the settlement of my estate to be made by my Executors as hereinafter set out.

The Appellant-Plaintiff contends that a reading of the will in its entirety clearly shows the intention of the testatrix to divide her estate equally between her two children, Elizabeth Popp and Roy S. Morgan, Jr., with the exception of a specific bequest of a diamond cluster ring to the testatrix's granddaughter, Wanda Sue Power, in the second dispositive paragraph. In addition, the Appellant contends that it was the intention of the testatrix to bequeath and devise to the Appellant one-half of the value of the farm, to be determined at the death of the testatrix, and which now has a value of approximately fifty thousand dollars due to appreciation and recent improvements made thereon, rather than a specific bequest of eight thousand dollars, with such valuation in the will being merely descriptive and not restrictive.

The Appellant-Plaintiff filed a declaratory action in Scott Circuit Court seeking an interpretation of the will of Mrs. Mary Morgan.

The Appellee-Defendant moved the court for a summary judgment and the court sustained the Appellee's motion and entered a summary judgment in favor of Appellee.

ARGUMENT

I.

THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT IN THE CASE AT BAR.

The trial court erred in granting summary judgment against the Plaintiff, Appellant herein, as the entire record shows that there are genuine issues as to material facts involved in the case at bar and thus did not meet the criteria set forth in Kentucky Civil Rule 56.03 and pertinent cases for the proper granting of summary judgment.

Kentucky Rule of Civil Procedure 56.03, with regard to summary judgment, provides as follows:

> The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories; stipulations, and admissions on file, together with the affidavits, if any, show that their is no genuine issue as to any material

fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

In the case at bar there does exist a genuine issue of material fact in that the parties to this litigation do disagree as to the value of the farm devised under the fifth dispositive provision of the will of Mrs. Mary Morgan (pages 3-4 of record) which provides:

> I will and devise my farm of 25 acres on the west side of the Soards Pike in Scott County, Kentucky, and all improvements thereon to my son, Roy S. Morgan, Jr., but I hereby place thereon a valuation of Sixteen Thousand Dollars ($16,000.00), and I direct that my said son shall pay to my daughter, Elizabeth Popp, the sum of Eight Thousand Dollars ($8,000) representing her one-half (½) interest in same, and so as to equalize her in the settlement of my estate. Upon such payment, the title to said tract of land shall vest absolutely and in fee simple in my said son, Roy S. Morgan, Jr., without requirement of any further deed of conveyance. Evidence of such payment shall be shown by the settlement of my estate to be made by my Executors as hereinafter set out.

This valuation in the will of the testatrix, Mary Morgan, was made in 1970 and presently, due to appreciation of land values and recent improvements made to this said tract, Appellant believes said farm to be worth fifty thousand dollars as shown by her affidavit

in opposition to Appellee's motion for summary judgment, (page 14 of record).

There further is a genuine issue of material fact as to whether the testatrix, Mary Morgan, in placing the value of sixteen thousand dollars ($16,000.00) on the farm relied upon information supplied by Appellee-Defendant. This allegation is set forth in paragraph seven (7) of Appellant-Plaintiff's complaint, (page 2 of record), and is denied in paragraph one (1) of Appellee-Defendant's answer, (page 8 of record).

Thus appellant submits that Appellee's motion for summary judgment should have been overruled for failure to meet the grounds set forth in C. R. 56.03, in that there are in fact material issues to be determined.

Another factor to be considered in regard to the propriety or impropriety of a summary judgment is the point in the proceedings at which the motion for summary judgment is made. In the case at bar, Appellee's motion was made early in the proceedings before the taking of any proof by either party. Honorable Judge Scott Reed addressed this situation where the trial court has nothing before it but the pleadings in *La Vielle* vs. *Seay*, Ky., 412 S.W. 2d 587, at page 590, and stated as follows:

> If the motion is made either by the claimant or by the defending party solely on the basis of the complaint, answer, and other pleading, if any, the motion is functionally equivalent to a motion for judgment on the pleadings under C. R. 12.03. This motion should be denied if, as against

the moving party, the pleadings raise any issue of material fact.

As heretofore pointed out, the pleadings in this case do raise issues of material fact and as such the Appellee's motion for summary judgment should have been overruled.

It is also apparent that the Court, in sustaining the Appellee's motion for summary judgment at this early stage in the proceedings, was using the procedure provided for in C. R. 56 as a substitute for a court trial which is contrary to the intention underlying said rule. The Kentucky Court of Appeals has so held in numerous cases as in *Sheppard* vs. *Immanuel Baptist Church,* Ky., 353 S.W. 2d 212, at page 214, where it is stated:

> C. R. 56 was never intended to be a substitute for a court trial in cases where a party has not had an opportunity to present all the facts which might help lead the court to a just determination of the cause;

and similarly in *Payne* vs. *Chenault,* Ky., 343 S.W. 2d 129, at page 133:

> Where there is a genuine issue on a material fact, and it is properly joined by the pleadings, a trial is the only battleground. Until the time of trial every litigant must have the opportunity to search for and secure whatever evidence may be necessary to perfect his case, and unless it is manifestly impossible for him to produce it he cannot be forced to a premature showdown in that respect by a motion for summary judgment.

The above cited cases illustrate that summary judgment is a drastic remedy and is one to be cautiously granted by a court. Upon a motion for summary judgment it is the duty of the court to examine the allegations of fact and any extraneous evidential sources solely to discover and determine whether there is an issue of fact to be tried and not to make any factual determinations. Moreover, since the burden of establishing the non-existance of any genuine issue of fact is upon the moving party, the court should take the view most favorable to the party against whom the motion is directed, giving that party benefit of all favorable inferences that may reasonably be drawn from the evidence and resolving all doubts as to existence of a genuine issue against the moving party. *Rowland* vs. *Miller's Adm'r*, Ky., 307 S.W. 2d 3. at page 6; and *Mitchell* vs. *Jones*, Ky., 283 S.W. 2d 716, at page 718.

In addition, before a court grants a summary judgment it must be satisfied that the sufficiency of evidence meets a rigorous standard. The court in *Rowland* vs. *Miller's Adm'r*, id., at page 7, in expressing that requirement quoted Judge John J. Parker in *Pierce* vs. *Ford Motor Co.*, 4 Cir., 190 F.2nd 910, op. cir. 915. Such standard is quoted as follows, with citations in that quote being omitted:

> It is only where it is perfectly clear that there are no issues in the case that a summary judgment is proper. Even in cases where the judge is of opinion that he will have to direct a verdict for one party or the other on the issues that have been raised, he should ordinarily hear the evidence and

direct the verdict rather than attempt to try the case in advance on a motion for summary judgment, which was never intended to enable parties to evade jury trials or have the judge weigh evidence in advance of its being presented. We had occasion to deal with the undesireability of disposing of cases on motions for summary judgment where there was real controversy between the parties in the recent case of - - - - where we said: 'It must not be forgotten that, in actions at law, trial by jury of disputed questions of fact is guaranteed by the Constitution, and that even questions of law arising in a case involving questions of fact can be more satisfactorily decided when the facts are fully before the court than is possible upon pleadings and affidavits. The motion for summary judgment, authorized by rule 56 Federal Rules of Civil Procedure, 28 U.S.C.A., which in effect legalizes the "speaking" demurrer, has an important place - - - - in preventing undue delays in the trial of actions to which there is no real defense; but it should be granted only where it is perfectly clear that no issue of fact is involved and inquiry into the facts is not desirable to clarify the application of the law. And this is true even where there is no dispute as to the evidentiary facts in the case but only as to the conclusions to be drawn therefrom.

Thus in applying the above stated principles and standard to the case at bar, it is evident that summary judgment should not have been granted as there are issues of material fact to be determined in the case; that to grant summary judgment at this early stage of the

proceedings and before any proof is taken is to use C. R. 56 as a substitute for trial which is contrary to the intention of the said rule and would force a premature showdown between the parties; that the court exceeded its proper function on summary judgment motions and engaged in the determinations of facts as evidenced by paragraph five (5) of the Findings of Fact, Conclusions of Law, and Judgment at page 28 of the record which states, "There has been no showing of mental capacity or undue influence herein" which was entered even though C. R. 52.01 provides that findings of fact and conclusions of law are unnecessary on decisions of motions under Rule 56; and that an inquiry into the facts of this case would help to clarify the application of the law.

II.

IF THIS CASE WAS A PROPER ONE FOR GRANTING SUMMARY JUDGMENT, IN THAT NO GENUINE ISSUES OF MATERIAL FACTS EXISTED, THEN SUMMARY JUDGMENT HOULD HAVE BEEN ENTERED FOR THE APPELLANT AS A MATTER OF LAW.

If this case was a proper one for the granting of summary judgment, in that no genuine issues of material facts existed, then summary judgment should have been entered for the Appellant as a matter of law as the application of well-established principles of law in will construction cases to the case at bar could only result in a finding that the testatrix's intention, as determined from the four corners of the will, was to treat her two children, Elizabeth Popp and Roy S. Morgan, Jr., equally in the settlement of her estate and that such intention

is only given effect by finding that the devise and bequest in the fifth dispositive paragraph was of one-half of the valuation of the farm as determined at the testatrix's death and that the valuation of sixteen thousand dollars was only descriptive.

The universally applied cardinal or "Polar Star" Rule in will construction cases is that the intent of the maker shall prevail in the absence of a conflict with public policy or a statutory provision. *Hanks* vs. *McDanell*, Ky., 210 S.W. 2d 784, at page 785. The law in regard to the determination of the testator's intent is also uniform and was stated in *Ford Adm'r* vs. *Wade's Adm'r*, Ky., 45 S.W. 2d 818, at page 819 as follows:

> The intention of a testator is to be collected from the whole will; and from a consideration of all of the provisions of the instrument, taken together, rather than from any particular form of work. The intention is not to be gathered from detached portions alone, and the court should not consider merely the particular clause of the will which is in dispute. The language employed in a single sentence is not to control as against the evident purpose and intent as shown by the whole will; in other words, a will is not to be construed per parcella, but by the entirety. As sometimes expressed, the intent is to be ascertained from a full view of everything within the 'four corners of the instrument.' If the whole will clearly indicates what was the testator's intention, the rules of law which aid in the construction of wills need not be invoked.

A consideration of the will of Mrs. Mary Morgan at pages 3-4 of the record in its entirety, clearly illustrates that it was her intention to treat her two children equally in the settlement of her estate. Such intent of the testatrix is evidenced by the fact that she bequeathed to each a wedding present from her parents in the third and fourth dispositive paragraphs; the fact that she used the language in the fifth dispositive paragraph "representing her (Elizabeth Popp) one-half (½) interest in same, and so as to equalize her in the settlement of my estate"; the fact that she devised and bequeathed all of the residue and remainder of her estate to her two children, Elizabeth Popp and Roy S. Morgan, Jr., equally in the sixth dispositive paragraph; and the fact that she nominated her two children as joint executors of the estate in the seventh paragraph of her will.

Thus the Mary Morgan will presents a general scheme or intention to treat her two children equally with the fifth paragraph presenting what could be termed as inconsistent intent if the bequest to Elizabeth Popp is considered to be one limited to eight thousand dollars. The law in this situation as sated in Corpus Juris Secundum, Wills, section 593 is as follows:

> A will should be interpreted to carry out, as far as possible, the general scheme or intention as shown by the entire document, and where a particular intent is inconsistent with the general intent, the former must give way to the latter.

However such analysis is not required if the valuation included in the fifth dispositive paragraph is considered to be informative or descriptive and not as con-

trolling as was so held in *McElroy* vs. *Trigg,* Ky., 177 S.W. 2d 867, where a clause in the will provided "To my two sister, Mary Frances Krueger and Pearl Shuster I give all my United States bonds amounting now to twenty thousand dollars ($20,000) par value, each to share alike," and at the time of the testator's death her estate included United States Bonds aggregating thirty two thousand five hundred dollars ($32,500). The Court held that the phraseology following the words, "all my United States bonds", was merely informative, rather than descriptive or definitive, and was not intended to limit or restrict the bequest of the bonds to $20,000.00.

Similarly in *Newell* vs. *State National Bank of Mayesville,* Ky., 348 S.W. 2d 916, where a codicil provided "I will - - - College Bonds $15,000.00 - - - Church Bonds $5000.00 or their equal in cash of this date" to a specified legatee and at the death of the testator he owned only $10,000.00 worth of bonds, the Court was faced with the question of whether the legatee should receive a total bequest of $20,000.00 or merely an amount equal to the value of the bonds he actually owned at death. The Court held that the bequest was limited to the bonds actually owned or an amount of cash equal to their value and added that the values stated opposite the two kinds of bonds should be merely additional description and not as controlling and that the erroneous valuation must be disregarded.

Further, in *Derren's Trustee* vs. *Deppen,* 117 S.W. 352, 132 Ky. 755, a codicil provided "my estate is 10,000 dollars. It is my desire that at my death my daughter, Matilda Dougherty, and my son, Rudolph Deppen,

equally receive half this sum. That is the only wish of their mother, that my daughter Matilda Dougherty and my son, Rudolph Deppen, equally receive $5,000.00: Matilda Dougherty $5,000.00 and my son Rudolph Deppen $5,000.00." However at the testatrix's death her estate totalled $16,000.00. Here the Court at page 355 said, "We attach little importance to the estimate fixed by the codicil upon the value of the testatrix's estate," and further said at page 355:

> It seems plain that the testatrix object in making the codicil in 1905 was to treat her son and daughter alike by giving them equal shares of her estate. She specifically says that each is to receive $5,000 of her estate, which she erroneously supposed to be $10,000. Any limitation should apply equally to both legacies; but none was intended. If the estate had amounted to only $8,000, it would hardly be claimed that any limitation applied to either share.

Appellant, relying upon this line of cases, contends that a reading of the will in it's entirety shows that the testatrix intended for her two children to share equally in her estate, with Roy S. Morgan, Jr., to get title to the farm subject to the equitable lien in favor of Elizabeth Popp in an amount equal to the value of one-half of the value of the farm as determined at testatrix's death and that the valuation of sixteen thousand dollars in the fifth paragraph was only informative and descriptive and was not intended to be restrictive, and that as such summary judgment should have been so entered as a matter of law for the Appellant.

CONCLUSION

The trial Court erred in granting summary judgment in the case at bar as there are issues of material fact to be determined in the case; that to grant summary judgment at this early stage in the proceedings is to improperly use C.R. 56 as a substitute for trial; that the trial court exceeded it's proper function on a C.R. 56 motion by making factual determinations; and that an inquiry into the facts of this case would help to clarify the applicable law.

If this case was a proper one for summary judgment, in that no genuine issues of material facts existed, then summary judgment should have been entered for the Appellant as a matter of law as a consideration of the will of Mary Morgan in it's entirety clearly shows that the testatrix's intention was to treat her two children, Elizabeth Popp and Roy S. Morgan, Jr., equally in the settlement of her estate with title to the said farm to go to Roy S. Morgan, Jr., subject to an equitable lien in favor of Elizabeth Popp in the amount of one-half the value of the property at the date of the testatrix's death.

Wherefore, Appellant respectfully submits that the Supreme Court of Kentucky should reverse and remand the summary judgment entered by the Scott Circuit Court.

Respectfully submitted,

JAMES L. GAY
137 South Main Street
Versailles, Kentucky 40383

Attorney for Appellant